

BRB No. 95-2064 BLA

LAURA MOYE LILLY)	
(Surviving spouse of TEDDY MOYE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED:
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Don M. Stacy, Beckley, West Virginia, for claimant.

Jennifer U. Toth (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (95-BLA-0278) of

¹ Claimant is Laura Moyer Lilly, surviving spouse of Teddy Moyer, the miner, who died on June 14, 1982. Director's Exhibit 29. The miner's initial claim for benefits, filed with the Social Security Administration (SSA) on December 30, 1971, was

denied on February 23, 1974. Director's Exhibits 22, 31. The miner filed a second claim with the Department of Labor (DOL) on December 30, 1976. Director's Exhibit 1. While his second claim was pending, the miner elected SSA review of his previously denied SSA claim, which was again denied and forwarded to DOL, where it merged with his second claim. Director's Exhibit 22. Mrs. Moye Lilly filed a survivor's claim on July 12, 1982. Director's Exhibit 28.

Administrative Law Judge Reno E. Bonfanti denying benefits on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time. Initially, Administrative Law Judge Edward J. Murty, Jr. credited the miner with fewer than ten years of coal mine employment, accepted the parties' stipulation to the existence of pneumoconiosis, but found that the evidence failed to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §410.416(b). Thus, he concluded that invocation of the interim presumption was not established pursuant to 20 C.F.R. §410.490(b)(2).

On appeal, the Director conceded invocation pursuant to Section 410.490(b)(1)(i) and (2). Accordingly, the Board vacated the denial of benefits and remanded the case for the administrative law judge to determine whether rebuttal was established pursuant to Section 410.490(c) and to consider the survivor's claim pursuant to Section 718.205(c) if necessary. *Moye v. Director, OWCP*, BRB No. 92-2467 BLA (Nov. 24, 1993)(unpub.).

On remand, the case was re-assigned to Judge Bonfanti who accepted the Director's concession that rebuttal was not established pursuant to 20 C.F.R. §727.203(b)(1)-(2), (4). Pursuant to Section 727.203(b)(3), however, the administrative law judge concluded that the opinions of Drs. Naeye and Spagnolo established rebuttal. Accordingly, he denied the miner's claim.

Regarding the survivor's claim, the administrative law judge found no entitlement pursuant to Section 718.205(c) because he concluded that the opinions of Drs. Naeye and Spagnolo "ruled out [pneumoconiosis] as a causative factor in the miner's death." Decision and Order on Remand at 8.

On appeal, claimant contends that the opinions credited by the administrative law judge are legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3). Claimant also challenges the administrative law judge's weighing of the evidence pursuant to Sections 727.203(b)(3) and 718.205(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 727.203(b)(3), claimant contends that the opinions of Drs. Naeye and Spagnolo are legally insufficient to establish rebuttal. Claimant's Brief at 33-35. The United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case arises, places the affirmative burden of proof on the party challenging entitlement to produce persuasive evidence that "rules out" any causal connection between total disability or death and coal mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); see *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989)(*en banc*); *Lattimer v. Peabody Coal Co.*, 8 BLR 1-509 (1986).

The administrative law judge correctly stated the *Massey* standard, then summarized the evidence of record. Decision and Order on Remand at 3-6. Dr. Daniel, board-certified in family practice, had examined the miner once and concluded that he was totally disabled due to pneumoconiosis. Director's Exhibits 14, 68; Claimant's Exhibit 6.

The death certificate indicated that the miner died due to an acute myocardial infarction. Director's Exhibit 29. On autopsy, Dr. Dy, board-certified in anatomical pathology, diagnosed acute myocardial infarction, coronary atherosclerosis, and moderate anthracotic pneumoconiosis. Director's Exhibit 30. He opined that the miner died due to the myocardial infarction, but in a later opinion added that the "anatomical damages . . . in the lungs secondary to his occupation of sixteen years as a coal miner and his habit of smoking" played a role in the miner's death. Director's Exhibits 30, 39.

Drs. Lee and Rasmussen, after reviewing the medical evidence, concluded that pneumoconiosis contributed to the miner's total disability and death.² Director's Exhibit 68; Claimant's Exhibits 3, 5. Dr. Ahmed, board-certified in anatomical and clinical pathology, reviewed the pathology slides and the other medical evidence of record and reached the same conclusion. Director's Exhibit 68; Claimant's Exhibit 4.

In contrast, Dr. Naeye reviewed the autopsy slides and the other medical evidence and concluded that the miner's pneumoconiosis was too mild to contribute in any way to his total disability or death. Director's Exhibit 37. He stated that the miner's death was due to complications of coronary artery disease which was

² Dr. Lee is board-eligible and Dr. Rasmussen is board-certified in internal medicine. Director's Exhibit 68; Claimant's Exhibits 3, 5.

unrelated to coal mine employment, and that the miner's mild pulmonary impairment during life had been due to centrilobular emphysema, which was due to smoking. *Id.* Dr. Spagnolo, after reviewing the medical evidence, also concluded that the miner's pneumoconiosis was too mild to contribute in any way to total disability or death. Director's Exhibits 37, 78. He concluded that the miner's death was due to severe heart disease and that the miner's pulmonary impairment during life was due to cardiac disease, as well as emphysema and bronchitis caused by smoking. *Id.*

The administrative law judge found the opinions of Drs. Naeye and Spagnolo "better reasoned and far more persuasive" than the others, and accorded their opinions determinative weight based on their "superior" qualifications.³ Decision and Order on Remand at 6-8. He concluded that "coal workers' pneumoconiosis is ruled out as a causative factor in any degree to the miner's death," and that "the miner was not totally disabled from coal workers' pneumoconiosis at the time of his death." Decision and Order on Remand at 8.

Contrary to claimant's contention, the opinions of Drs. Naeye and Spagnolo are sufficient to meet the Section 727.203(b)(3) rebuttal standard under *Massey*. Both physicians acknowledged the existence of pneumoconiosis and the miner's pulmonary impairment, see *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), but explained that the pneumoconiosis was too mild to contribute to his total disability or death in any way. See *Massey*; *supra*; *Borgeson*; *supra*. Both stated that the miner's death was due to heart disease, and identified cardiac disease, chronic bronchitis and emphysema due to smoking⁴ as the sources of his disability.

³ The record indicates that Dr. Naeye, board-certified in anatomical and clinical pathology, is also the chairman of the pathology department at the Pennsylvania State University College of Medicine and has written extensively on the subject of pulmonary pathology. Director's Exhibit 37. Dr. Spagnolo, a board-certified internist and pulmonologist, is also chairman of the Division of Pulmonary Diseases and Allergy at the George Washington University Medical Center. Director's Exhibits 37, 78.

⁴ We agree with the Director that the limitation on the probative value of the opinions of non-examining physicians on matters not addressed by examiners is inapplicable in this case because Dr. Naeye based his opinion in part on an examination of the miner's lung tissue and because the autopsy prosector addressed the miner's smoking as a causative factor. Director's Exhibits 37, 39; see *Turner v. Director, OWCP*, 927 F. 2d 778, 15 BLR 2-6 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

Director's Exhibits 37, 78. Therefore, we reject claimant's argument that these opinions are legally insufficient.

Claimant further contends that the autopsy prosector's opinion is entitled to greater weight than that of Dr. Naeye. Claimant's Brief at 34, 37. We reject this contention, because the administrative law judge may, but need not, accord greater weight to the prosector's opinion. See *Gruller v. BethEnergy Mines Inc.*, 16 BLR 1-3 (1991); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985).

We also reject claimant's general assertion that the evidence establishes that the miner's total disability was due to pneumoconiosis. Claimant's Brief at 35. The Board is not empowered to reweigh the evidence, see *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), and the administrative law judge considered all relevant evidence and provided valid reasons for crediting the medical opinions of Drs. Naeye and Spagnolo, see *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988), which are sufficient to support a finding of rebuttal. See *Massey, supra*; *Borgeson, supra*. Therefore, we affirm the administrative law judge's finding pursuant to Section 727.203(b)(3).

Pursuant to Section 718.205(c), claimant generally contends that the evidence establishes that the miner's pneumoconiosis was a substantial contributing cause or factor leading to death. Claimant's Brief at 36. Inasmuch as the administrative law judge permissibly credited medical opinions sufficient to meet the applicable legal standard, see *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), and claimant offers no specific legal or factual challenge to the administrative law judge's finding, see 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); see also *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), we affirm the administrative law judge's finding pursuant to Section 718.205(c).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____ JAMES F.
BROWN
Administrative Appeals Judge

_____ NANCY S.
DOLDER
Administrative Appeals Judge